

DEPT. OF TRANSPORTATION
DOCKETS

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BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION

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Docket No. FMCSA-2001-11061-23
New Entrant Safety Assurance Process

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Comments Of The
Transportation Lawyers AssociationIntroduction

These comments are filed on behalf of the Transportation Lawyers Association (TLA). TLA, founded in 1937, is a bar association comprised approximately 700 attorneys who represent the providers and consumers of transportation services. TLA members are located throughout the United States, Canada and Mexico. TLA regularly participates before federal agencies in connection with proposals to improve highway safety.

Over 15 years ago, TLA recommended that new entrants be required to demonstrate knowledge of their highway safety obligations prior to beginning operations. These long ago comments were made in response to actions taken by the Interstate Commerce Commission (ICC) in revising its OP-1 application form to continue the use of a brief certification required by applicant motor carriers who had no DOT safety history. The certification consisted of a sentence that the applicant knew and would abide by applicable safety rules. As reported in Ex Parte 55 (Sub-No. 69), Rules Governing Applications for Operating Authority, 6 ICC 2d 266, 278 (1989), "TLA, ATA, and other commentators charge that the safety compliance certification required of unrated carriers is inadequate to the task of educating new entrants on their safety fitness obligations." TLA's stance on the issue resulted from the experience of its members following an even earlier ICC action which instituted the certification in place of a procedure that required applicant's to explain how they would satisfy highway safety requirements.

Since the filing of those comments, TLA has repeatedly

reiterated that point to the ICC until its demise, and to the Federal Highway Administration and its successors. TLA strongly recommended that any carrier applying for authority should be required to submit narrative responses that demonstrated not only its knowledge of the safety requirements, but also its individualized plan for adhering to those obligations.

Over the years, TLA's persistence has had some positive impact. For example, the safety certification has been expanded from its initial single sentence to its present form. At TLA's prodding a separate safety certification for small vehicle operators, otherwise exempt from the FMCSRs, was instituted. While half-hearted steps in the right direction, the results are obviously disappointing. It should be noted that application forms proposed for Mexican domiciled carriers do include several sections requiring narrative responses.

As even FMCSA now agrees, as evidenced by its Regulatory Evaluation for this proceeding (see, FMCSA-2001-11061-3 at pages 3-5), statistical research conducted in 1988, 1995 and 1998 consistently confirmed that new entrants are more likely than established carriers to be involved in accidents and that they are less likely to have effective safety management systems in place. Professor Thomas Corsi of the University of Maryland has concluded that a "safety learning curve" exists, and that as long ago as 1988, Professor Corsi recommended that in order to reduce the safety learning curve and improve highway safety, the application process should, "include as a certificate prerequisite the implementation of a comprehensive risk management/safety program by the prospective entrants." See, T. Corsi and P. Fanara, "Deregulation, New Entrants and the Safety Learning Curve," Journal of Transportation Research Forum, Vol. 29, No. 1, 1988 at page 8.

As will be more fully explained below, FMCSA's instant proposals bring us no closer to the statutory command of ensuring that carriers are knowledgeable about their safety responsibilities prior to commencing operations. Indeed, FMCSA knows that to be the case.

These Proposals Do Not Meet
The MCSIA Requirements

FMCSA proposes nothing in this proceeding that will reduce the "safety learning curve" before a new carrier begins operating.

In his May 26, 1999 testimony before the Subcommittee on Ground Transportation, Committee of Transportation and Infrastructure, U.S. House of Representatives, former Congressman Norman Y. Mineta called for the creation of a "comprehensive motor carrier safety fitness program for new entrants before the end of 2000," Prepared Statement at 8. The future Secretary of Transportation based his recommendation upon his assessment of the existing authorization procedures. As he recounted at page 8 of his prepared statement:

There are minimal requirements in securing Motor Carrier Safety operating authority and licensing at the Federal or state levels. For Federal registration there are no requirements for new carrier entrants beyond filing a self certification of the carriers' knowledge of the Federal Motor Carrier Regulations, and certifying proof of the requisite insurance and listing of their process agent. Equally important, studies indicate that while some states have nominal educational program elements for new entrants, no state has a comprehensive educational program requirement. (emphasis added)

Within seven months of Mr. Mineta's testimony, President Clinton signed the Motor Carrier Safety Improvement Act of 1999 (MCSIA) into law. Of particular pertinence was Congressional adoption of Mr. Mineta's new entrant recommendation. MCSIA's Section 210(b) required the initiation of a rulemaking to establish requirements to ensure that applicant carriers are knowledgeable about Federal motor carrier safety standards. MCSIA's Section 210(b) also directs that,

As part of that rulemaking, the Secretary shall consider the establishment of a proficiency examination for applicant carriers as well as other requirements to ensure such applicants understand applicable safety regulations before being granted operating authority. (emphasis added)

FMCSA now states that is complying with MCSIA's Section 210 by requiring new entrants to accept delivery of an FMCSA packet designated as educational and technical assistance material. The new entrant will also be provided with a FORM MCS-150 and a FORM MCS-150A. If the new entrant is to be a for-hire carrier, it will receive the appropriate OP-1 registration form. Finally, the new entrant may be subjected to a safety audit within 18 months of commencing operations.

As FMCSA knows, these proposals fall far short of Secretary Mineta's recommendation. As FMCSA states at page 31981 of its Federal Register publication, the "centerpiece of the new entrant program is the safety audit, which will be performed on all new entrants within 18 months of their registration." However, an audit 18 months after the commencement of operations does nothing to satisfy the statutory command that "applicants understand applicable safety regulations before being granted operating authority. (emphasis supplied). It should also be noted that FMCSA's ability to timely conduct the audit is based upon an estimate that the annual number of new entrants will not exceed 40,000. In its Safety Action Plan 2000-2003 at page 5, FMCSA stated that the number of new entrants was increasing rapidly, totaling, "[b]etween 55,000 and 60,000...in 1999."

In order to fulfill the Congressional mandate, FMCSA proposes continued reliance upon procedures that have already proven inadequate. Safety rule self-certification has existed for approximately 20 years. Appendix A (the 1995 version) attached hereto, is evidence that the educational and technical assistance material has been provided to motor carriers for at least 7 years. Obviously, if these efforts had been successful, the passage of MCSIA's Section 210 would have been unnecessary.

In addition to Secretary Mineta's above cited admission of failure of a system that FMCSA would perpetuate, an FHWA Analysis Brief ("New Entrant Safety Research" by Dale Sienicki, issued March, 1999, Publication No. FHWA-MCRT-99-009) stated:

Key motor carrier safety Stakeholders and researchers reviewed the current safety fitness determination process and concluded that one of its most conspicuous

limitations was the lack of a prequalification program and monitoring for new motor carriers. Currently, motor carriers can begin interstate operations simply by registering with the U.S. Department of Transportation (USDOT) and obtaining the required insurance. In contrast, in other industries performing commercial operations, particularly in the transportation sector, a new business must satisfy certain safety requirements before it can begin. (emphasis supplied).

FMCSA's cynical confidence in the utility of its own proposal is dramatically revealed by its assessment contained in its Regulatory Evaluation at page 8 that:

We conservatively estimate it will take new entrants one hour to read the educational and technical assistance package sent to applicants, and to complete the forms. (emphasis supplied).

The lack of effectiveness of these procedures in the past is also evident from filings already made in this docket. Comments filed on behalf of Consolidated Safety Services, Inc. (CSS). CSS is a contractor employed by the Department of Defense for the past 12 years to, in part, review whether motor carriers registered with FMCSA are knowledgeable and abide by Federal highway safety requirements. Not surprisingly, CSS stated that, "[h]istory has already proven that a motor carrier's self-certification of compliance, coupled with all the educational materials and technical assistance available, ensures nothing."

In sum, there clearly is no effective pre-operational requirement contained in this proposal.

Safety Narratives

TLA has, over the years, consistently recommended the use of narrative responses to obtain assurance not only that the carrier is knowledgeable about its highway safety obligations, but also that it has a plan to fulfill those obligations.

For example, rather than checking a block indicating

it is "familiar" with drug and alcohol testing, it should be required to explain how it will satisfy that obligation. An explanation of an applicant's vehicle maintenance program should be required. Driver selection, training and review procedures should be provided. These are but examples of subjects that could be covered

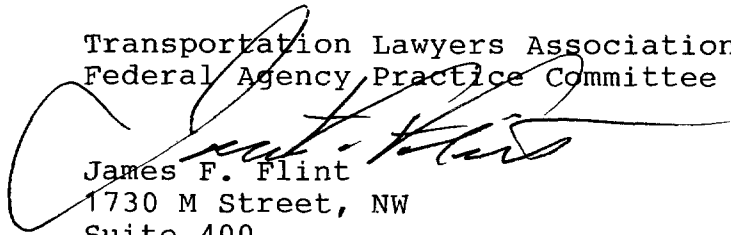
While the effort to respond to narrative requirements would certainly require more than the single hour conservatively consumed by FMCSA's proposal, the effort alone would provide that new entrant with much greater familiarity with the requirements than any "check-the-block" certification. In addition, regulatory review of the responses would quickly ascertain whether the applicant's grasp of its safety obligations was sufficient, an option that would comfortably fit the definition of a proficiency examination. This option is actually less complex and expensive than the pre-qualification seminar/examination proposal by DOT's Volpe Center which FMCSA does not even bother discussing.

In sum, narrative responses provide the public and FMCSA with assurance that the prospective operator is prepared to meet its highway safety obligations prior to transporting goods or people on our nation's highways.

Conclusion

One can only hope that the FMCSA will read Section 113(b) of the Motor Carrier Safety Improvement Act of 1999 and revise this proposal accordingly.

Transportation Lawyers Association
Federal Agency Practice Committee



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Dated: July 15, 2002

FOREWORD



I'm George Reagle, the Associate Administrator of the Office of Motor Carriers in Washington, D.C. My office is responsible for the issuance, administration, and enforcement of the Federal Motor Carrier Safety Regulations, 49 CFR Parts 325, 350, 382-399, the Hazardous Materials Regulations, 49 CFR Parts 100-180, as well as Part 40 as it pertains to the drug and alcohol testing requirements. As a motor carrier, you have the responsibility to comply with these regulations.

To assist you in your compliance effort, we are providing you with this educational and technical assistance package which contains summaries of key regulations. A complete copy of the regulations should be obtained for a thorough understanding.

Our experience has shown that compliance with these regulations as part of your safety management program will improve the safety and efficiency of your operation, and reduce accidents and insurance costs.

If you have any questions regarding the regulations or your safety responsibilities, please contact the local Office of Motor Carriers in your State (see enclosed list). We very much appreciate your time and hope that you will join us in a partnership for highway safety.

Sincerely,

George L. Reagle
Associate Administrator
for Motor Carriers

INTRODUCTION

The Federal Highway Administration's Office of Motor Carriers (OMC) has produced this "Partnership in Highway Safety" educational and technical assistance package. This package provides basic compliance guidance to the Federal Motor Carrier Safety Regulations (FMCSRs). However, it is not intended to be a substitute for these regulations. To purchase a complete copy of the FMCSRs, Parts 300-399, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone : (202) 512-1800.

Our overall goal is to improve the safe transportation of passengers and goods on the nation's highways, through a coordinated effort of Federal, State, and industry organizations to reduce fatalities, injuries, property damage and Hazardous Materials incidents. We implement this safety and compliance program through a national network of nine regional and sixty-six field offices.

This package is comprised of folders, each containing a specific safety regulation topic that is covered in the FMCSRs. These folders are color coded by topic and are listed in the Table of Contents. Each folder contains information sheets that cover the highlights of that section. Please feel free to reproduce any or all material in this package and to distribute copies as needed.

It is the responsibility of motor carrier operators and drivers to know and comply with all applicable FMCSRs. Safety compliance and safe operations translate into saved lives and property. We believe the information in this package, when effectively applied, will contribute to safer motor carrier operations and highways.

Federal Motor Carrier Safety Administration Education and Technical Assistance Program

INTRODUCTION

The Federal Motor Carrier Safety Administration (FMCSA) has produced "A Motor Carrier's Guide to Improving Highway Safety" for our Education and Technical Assistance Program. This booklet provides basic compliance guidance to the Federal Motor Carrier Safety Regulations (FMCSRs). However, it is not intended to be a substitute for these regulations. To purchase a complete copy of the FMCSRs, Parts 300-399, contact the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, telephone : (202) 512-1800 or at www.access.gpo.gov.

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